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IN THE

Supreme Court of the United States

October Term, 1954

DOCKET No. 54

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON A WRIT OF CERTIORARI TO THE
COURT OF APPEALS, STATE OF NEW YORK

PETITIONER'S REPLY TO SUPPLEMENTAL BRIEF FOR RESPONDENT

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(1)

Introduction

That the petitioner raised the question of the unconstitutional application of Section 903 of the New York City Charter appears in the narration of "questions raised" on page 2 of Petitioner's Brief, subdivision (c).

The Court of Appeals certified that Federal constitutional questions were raised and passed upon. Since the petitioner upon his refusal to testify raised the question of the deprivation of his immunity without due process of law, and his trial counsel continued with like objection,

including the contention that Section 903 worked an unlawful duress (R. 58, fol. 172; R. 161, R. 209) it is apparent that all subsidiary questions related thereto are embraced therein. The application for a Writ of Certiorari, page 4, subdivisions 2 and 3 broadly raised the question.

The Revised Rules now provide, Rule 40 (d) (1): "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

In this case, the question of the constitutional application of Section 903 to the petitioner is fairly embraced, because his argument below and in this Court is that it is part of a web of facts that has deprived him of due process. The unconstitutional application of 903 is a strand in that web.

The petitioner, in any event, argues in Petitioner's Brief, that irrespective of Section 903, the factual situation whereby petitioner was led to his predicament, through the doubt and uncertainty of his rights deprived him of due process.

(2)

As Applied in This Case, Considering All Factors, Section 903 Operated to Defeat a Valuable Constitutional Protection

The test of a statute is its operation and effect. *Near* v. *Minnesota,* 283 U. S. 697 at 708, bottom.

What was demanded from the petitioner is not merely that he testify. This demand could have been enforced by contempt proceedings. At that juncture the respondent would have had the testimony it sought, but the petitioner

would have had the immunity the statute provided him. (Section 381 of Penal Law.) The petitioner would then have been protected under the state constitutional and statutory guarantee against self-incrimination.

From the days of Liliburne's defiance and ordeal to this day, the right against self-incrimination has been recognized and honored. The events of current history have more than proved the worth of that shield. The contemporary rationale can even be improved upon. It is not only a protection against tyranny. It is a measure of security to the citizen in a cruel and hazardous world. The world he lives in is indeed bleak and grim. The dangers now attendant upon living in a world where the multitude of laws possible of transgression is counted in multiples of 100,000 (aside from the perils of the infinite catalog of diseases and accidents) warrants the conclusion that Schiller's poem on Hope was a paean on optimism. The ineluctable fact is that life today is grim and hazardous. The guarantee against self-incrimination protects the citizens in the form of an assertion to his possible prosecutor that he wants to be left alone, and that if a prosecutor has any charge against the citizen it is the prosecutor who must prove guilt by his own evidence. It is not for the citizen to convict and penalize himself. This is a measure of security in a very insecure world.

But the respondent was not satisfied that petitioner should furnish testimony and have his constitutional protection. It was insistent that he give up a constitutional protection.

To consider the problem in hand, of determining the reasonableness of Section 903 by its insistence upon a

waiver of immunity, it is necessary to make the distinction between (a) compelling the testimony and (b) demanding that a waiver of the constitutional guarantee be executed on the pain of forfeiture of livelihood.

This is not the case where a policeman invoked his constitutional protection, remained mute and lost his job. In that type of case it might be urged by some that while the policeman had his constitutional right to be silent, he, nevertheless, had no right to be a policeman, especially where the testimony related to his work as a policeman. Section 903 provides in part for that type of situation.

The instant case, however, deals with that part of Section 903 which says that if the public employee "shall refuse to waive immunity from prosecution on account of *any matter* in relation to which he may be asked to testify upon any such hearing or inquiry, his * * * employment shall terminate."

This part of the statute does not seek his testimony. This part does not automatically cancel his employment because of refusal to testify. This part squarely demands that the employee give up his constitutional right against self-incrimination concerning "*any matter* (not merely concerning *his* work) (Ex. 2R 145).

The converse of this demonstrates that it is not his silence that is punished. It is his refusal to waive immunity that is punished. If he forfeited his constitutional immunity it follows conversely that he could still remain employed as a policeman.

From the foregoing, it is clear that what was sought from petitioner is that he give up his constitutional protection against self-incrimination.

This, petitioner submits was an unreasonable demand and an unreasonable condition of his employment.

The choice given to petitioner was in reality no choice. It was an illusory choice. It was the "free" choice that it was once said, borrowers had in contracting with usurers.

It was pointed out in Petitioner's Brief that the force of *Garner* v. *Board of Public Works*, 341 U. S. 716; *Wieman* v. *Updegraff*, 344 U. S. 183; *Adler* v. *Board of Education*, 342 U. S. 485, have impliedly cast off the troublesome dictum of the *McAuliffe* case that public employment does not carry the protections afforded by the Federal Constitution.

It is submitted that since such employments carry constitutional protections, it follows that petitioner can invoke constitutional guarantees to protect him from unconstitutional conditions of his employment.

In another context, where pecuniary rights alone were at stake, this Court, denied the right of a state to require the surrender of a constitutional right as a condition of the exercise of a privilege. In *Frost et al.* v. *Railroad Commission of the State of California*, 271 U. S. 583, the statute required that auto transportation companies had to obtain a permit to operate. In addition, it required a certificate of public convenience and necessity be obtained for the exercise of the privilege of transportation. The effect of the statute was to require a private carrier to dedicate his business to public use as a condition of using the highways. This Court held the requirement to be an unconstitutional condition of exercising a constitutional right.

This Court said in the *Frost* case:

> "May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so

carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject. In reality the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." * * *

"It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it, upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is unconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

In this connection, it is noteworthy that in *Matter of Grae*, 282 N. Y. 428, at 433, it was held that the refusal by a lawyer to sign a waiver of immunity could not subject to disciplinary proceedings. He had a right, said the Court, to exercise his privilege against self-incrimination without penalty.

In *Ex-Parte Young*, 209 U. S. 123, 144 a claim was made by a utility company that penalties imposed for challenging

rates fixed was an imposition of an unconstitutional condition. The effect of the penalty would take away the freedom of asserting a constitutional right. This Court upheld that claim. See also, *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53; *Missouri* v. *Chicago, etc.*, 241 U. S. 533. The rationale behind these cases, which is applicable to the instant one, is that a person should not suffer a penalty for asserting a constitutional right. In those cases, the law in effect said, give up your right to challenge the law or be penalized. In this case, the Charter says, give up your constitutional protection against self-incrimination or else be penalized.

(3)

As stated by the writer upon the argument, the petitioner was granted Hobson's choice. It was illusory. Consequently, the demand upon him worked a duress which led to the chain of uncertainties and ultimately to his conviction for contempt.

The statute as applied to petitioner was unreasonable therefore, in a doublefold manner. First, it was unreasonable not because it insisted that he testify. It was unreasonable because it insisted that he renounce a constitutional protection to which all free men are entitled, be they employees of the municipality or otherwise.

Second, the statute was unreasonably applied in that it created an element of duress, the duress being the economic security of his employment.

To state, as respondent does that this requirement was a contractual obligation assumed upon employment begs the whole question. The question is: Is this condition

valid; is it a reasonable requirement of employment? Petitioner has already shown that it is an unreasonable and unconstitutional condition and requirement.

Even the citation by respondent (p. 13, Supplemental Brief) of Wigmore, *Evidence,* stands for what petitioner has urged, that duress in obtaining a waiver of the privilege against self-incrimination voids such waiver.

It migh also be noted parenthetically in connection with the respondent's stress that the statute is a term of contract,—that the Fifth Amendment and similar provisions against self-incrimination could be rendered nugatory. If all employers incorporated a clause in all employment contracts requiring such a waiver, then, if such clause were upheld as a reasonable condition of employment, little would be left of the protection against self-incrimination. This observation goes even farther than that expressed by Mr. Justice Black upon the argument of the consequences that would follow to all Federal employees if a similar provision were adopted by the Federal government.

(4)

In All Events, Contumaciousness Is the Crux of the Conviction

In the welter of the arguments in this case, it should not be forgotten that the petitioner was not convicted for bribery or gambling. He was convicted for being in contempt. Contempt implies contumaciousness. From the record in this case it cannot be said that this petitioner was contumacious. At best, it can be said that he refused to testify because his constitutional rights were endangered.

At worst, it can be said that there was doubt and confusion as to what his rights were. But in no sense was he contumacious.

If there is any question that petitioner's doubts and uncertainties were genuine, the answer is found on pages 14 to 18 of Supplemental Brief of Respondent, for indeed those pages are a glaring example of the uncertainties and doubts that were petitioner's. If the complex and elaborate statement there made is essential to explain why petitioner should have testified it illustrates how uncertain petitioner was. How could it therefore be said that he was contemptuous? Must a citizen be placed in jeopardy of being held in contempt when clarity of law is lacking, and moreover, when clarity must be labored even by the District Attorney?

(5)

Petitioner Will Be Required to Testify, Absent the Waiver of Immunity

At the argument the question was posed,—What would happen if the Court should strike down the waiver? The answer is that under the statute, the petitioner would be required to testify. But he would still possess his constitutional protection against self-incrimination. Thus, the respondent would have the testimony it seeks, but the petitioner would retain his constitutional safeguard. Also—the petitioner's rights and obligations would stand clear, unclouded by the doubts and uncertainties, that brought about his conviction for contempt.

(6)

CONCLUSION

The Judgment of Conviction Should Be Reversed

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December 10, 1954

Respectfully submitted,

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